CITATION: Seed v. Ontario, 2012 ONSC 4588
COURT FILE NO.: CV-11-420734
DATE: 20120808

ONTARIO

SUPERIOR COURT OF JUSTICE

PROCEEDING UNDER the *Class Action Proceedings Act, 1992*, S.O. 1992, C. 6

BETWEEN:	)	
	)	
ROBERT SEED	)	*Kirk Baert*, *Celeste Poltak* and *Jonathan Bida* for the plaintiff
Plaintiff	)	
	)	
– and –	)	
	)	
HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF ONTARIO	)	*Robert Ratcliffe* and *Erin Rizok*, for the defendant
	)	
Defendant	)	
	)	
	)	**HEARD:** In Writing

C. HORKINS J.

[1] In reasons released May 4, 2012, I certified this action as a class proceeding. The parties have not been able to agree on costs. Written submissions have been exchanged.

[2] The plaintiffs seek costs on a full indemnity basis. The fees, disbursements and HST total $174,639.61. The plaintiffs argue that full indemnity costs are justified for the following two reasons relating to the manner in which the defendant approached the certification motion:

(1) The defendant unnecessarily increased the costs of certification by refusing to advise of its position on certification. The defendant even failed to comply with its confirmation to the court that it would advise of its firm position by January 13, 2012. The defendant never advised of its position and delivered its responding factum three weeks late.

(2) While not an abuse of process *per se*, once the defendant finally revealed its position on certification, it chose to raise the same issues that it raised in the *Slark (Litigation guardian of) v. Ontario*, [2010] O.J. No. 5187 (S.C.J.)("*Slark*") certification motion, including the exact issues for which leave to appeal was denied; the defendant raised no other issues. The defendant merely sought to re-litigate the issues determined in *Slark*.

[3] Alternatively, if full indemnity is not allowed, the plaintiffs seek partial indemnity costs until December 22, 2011 (the date of their offer to settle the certification motion) and full or substantial indemnity costs thereafter.

LEGAL FRAMEWORK

[4] The source of judicial discretion to award costs is set out in s. 131 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 that states:

> 131.(1) Subject to the provisions of an Act or rules of court, the costs of and incidental to a proceeding or a step in a proceeding are in the discretion of the court, and the court may determine by whom and to what extent the costs shall be paid.

[5] In addition to this general discretion, an award of costs is governed by rules 49 (in the event of an offer to settle) and 57.01 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194. An offer was made in this case.

[6] When exercising its discretion under s. 131(1) *Courts of Justice Act*, s. 31(1) of *Class Proceedings Act, 1992*, S.O. 1992, c. 6 ("Class Proceedings Act") states that the court "may consider whether the class proceeding was a test case, raised a novel point of law or involved a matter of public interest." None of these considerations are engaged in this case.

[7] In *Pearson v. Inco Ltd.*, [2006] O.J. No. 991 (C.A.) at para. 13 the court identified the following principles for fixing costs on a certification motion:

> (1) Ontario, unlike other class proceedings jurisdictions such as British Columbia, has not sought to interfere with the normal rule that costs will ordinarily follow the event. ...
>
> (2) The costs must reflect what is fair and reasonable: *Boucher v. Public Accountants Council for the Province of Ontario*, [2004] O.J. No. 2634 (C.A.). ...
>
> (3) The costs should, if possible, reflect costs awards made in closely comparable cases, recognizing that comparisons will rarely provide firm guidance ....
>
> (4) A motion for certification is a vital step in the proceeding and the parties expect to devote substantial resources to prosecuting and defending the motion. ...
>
> (5) The costs expectations of the parties can be determined by the amount of costs that an unsuccessful party could reasonably expect to pay. ...
>
> (6) The views of the motion judge concerning the complexity of the issues and what is fair and reasonable. ...

(7) The case raises an issue of public importance.

(8) A fundamental object of the CPA is to provide enhanced access to justice.

...

THE DEFENDANT'S POSITION

[8] The defendant does not contest the plaintiff's disbursements that total $4,128.26 (inclusive of HST). The disbursements are reasonable and are allowed.

[9] The defendant's position is summarized as follows.

- There is no "sanction-worthy conduct" that justifies full indemnity costs or substantial indemnity costs.
- Rule 49.10 entitles the plaintiff to partial indemnity costs up to the date of the offer and substantial indemnity costs thereafter.
- The costs requested are excessive.

ANALYSIS

Are Full Indemnity or Substantial indemnity Costs Justified?

[10] The Ontario Court of Appeal, following the principle established by the Supreme Court, has repeatedly stated that elevated costs are warranted in only two circumstances: through the operation of an offer to settle under rule 49.10, where substantial indemnity costs are explicitly authorized and when the losing party has engaged in behaviour worthy of sanction.

[11] It is agreed that the plaintiff's offer to settle entitles him to substantial indemnity costs from the date of the offer forward. The issue here is whether the plaintiff is entitled to substantial or full indemnity costs throughout because of the defendant's conduct. It is clear that such elevated costs should only be awarded when there is a clear finding that the defendant's conduct was reprehensible, scandalous or outrageous.

[12] In *Davies v. Clarington (Municipality)*, 2009 ONCA 722, the court reviewed the law governing an elevated costs award as follows:

> 29 In *Young v. Young*, [1993] 4 S.C.R. 3, at p. 134, McLachlin J., described the circumstances when elevated costs are warranted as "only where there has been reprehensible, scandalous or outrageous conduct on the part of one of the parties."
>
> 30 The same principle was expanded upon in *Mortimer v. Cameron* (1994), 17 O.R. (3d) 1 (C.A.), at p.23, where Robins J. A., speaking for the court, set out the restricted circumstances in which a higher costs scale is appropriate with reference to Orkin at para. 219.
>
> > An award of costs on the solicitor-and-client scale, it has been said, is ordered only in rare and exceptional cases to mark the court's

> disapproval of the conduct of a party in the litigation. The principle guiding the decision to award solicitor-and-client costs has been enunciated thus:
>
> [S]olicitor-and-client costs should not be awarded unless there is some form of reprehensible conduct, either in the circumstances giving rise to the cause of action, or in the proceedings, which makes such costs desirable as a form of chastisement. Further, in considering the expectations of the parties, it is appropriate to compare the costs claimed by and awarded to the various parties. The trial judge awarded Blue Circle an amount in legal fees that was almost double those that were received by the plaintiffs. The settling defendants could not have anticipated a disparity of this nature.

31 The narrow grounds justifying a higher costs scale were further reinforced by Abella J.A. in *McBride Metal Fabricating Corp. v. H. & W. Sales Co.* (2002), 59 O.R. (3d) 97 where, at para. 39, she said:

> Apart from the operation of Rule 49.10 (introduced to promote settlement offers), only conduct of a reprehensible nature has been held to give rise to an award of solicitor-and-client costs. In the cases in which they were awarded there were specific acts or a series of acts that clearly indicated an abuse of process, thus warranting costs as a form of chastisement.

See also: *Walker v. Ritchie* (2005), 197 O.A.C. 81 at para. 105, reversed on other grounds, [2006] 2 S.C.R. 428.

[Footnote omitted.]

[13] The plaintiff argues that full indemnity or, alternatively, substantial indemnity costs are justified because of the manner in which the defendant approached the certification motion. Specifically, the defendant unnecessarily increased the costs of the certification motion by refusing to advise class counsel of its position and delivering its factum three weeks late. While the court does not condone the defendant's late delivery of its factum, this is not "reprehensible, scandalous or outrageous" conduct.

[14] Second, the plaintiff says that when the defendant revealed its position on the certification motion, it chose to raise the same issues that it argued and lost in a similar case (*Slark*). In summary, the defendant's approach to the certification motion wasted counsel and judicial resources and the defendant made no effort to avoid this waste.

[15] This action arises out of the defendant's operation, administration and management of the W. Ross MacDonald School for the visually impaired, formerly the Ontario School for the Blind ("Ross MacDonald"). Similar class actions have been certified against the defendant in other "institution" cases involving the care of class members who were resident in a facility operated by the defendant. Each class action involved systemic abuse.

[16] *Slark* was the first of these systemic abuse cases. In *Slark*, the same defendant unsuccessfully challenged certification and leave to appeal certification was denied. After *Slark*, the defendant consented to certification in two other institution cases: *Bechard v. Ontario* and *McKillop v Ontario*. The certification motion in this action followed. It is not surprising that class counsel expected the defendant to consent to certification as it had done in *Bechard* and *McKillop*. However, the defendant did not consent. Instead, it delayed revealing its position despite many requests from class counsel. No doubt this was annoying but it was not "reprehensible, scandalous or outrageous" conduct.

[17] When the defendant finally revealed its position, class counsel saw that the defendant had raised the same points against certification that it had argued and lost in *Slark*. I dealt with this in paras. 79-81 of the certification decision as follows:

> 79 The defendant raises five specific objections to this certification motion that I will address as the s. 5 criteria are considered. Briefly the defendant's position is as follows:
>
> (1) There is no cause of action for a negligence claim based on inadequate funding.
>
> (2) There is no cause of action for breach of fiduciary duty prior to 1963.
>
> (3) The statement of claim does not plead material facts to support the breach of fiduciary duty claim.
>
> (4) The class definition is too broad and there is no evidence to support the existence of the class after 1985.
>
> (5) It is not appropriate to certify a question that asks if the court can make an aggregate assessment of damages.
>
> 80 It is significant that the defendant raised most of the same arguments in *Slark (Litigation guardian of) v. Ontario*, [2010] O.J. No. 5187 at paras. 136 and 147 (S.C.J.) ("*Slark*"). Cullity J. certified the action in *Slark* as a class proceeding. *Slark* was an action against the same defendant as in this case, the province of Ontario. In *Slark* the plaintiff alleged negligence and breach of fiduciary duty against the province for its operation and management of a residential facility for persons with cognitive disabilities. The province unsuccessfully challenged all five criteria for certification in that action and unsuccessfully sought leave to appeal the certification order.
>
> 81 The plaintiff argues that the defendant should not be permitted to raise these arguments against certification. The plaintiff says that it is an abuse of process for the defendant to make the same arguments against certification that it raised and lost in *Slark*. I am reluctant to characterize the defendant's conduct in this manner given that we are dealing with different plaintiffs and a different institution. I have carefully considered the defendant's arguments and how they were dealt with in

> *Slark*. As set out below, there is no principled reason to disagree with the result in *Slark*. In these circumstances, it is not necessary to consider if the defendant should be precluded from making these arguments.
>
> [Emphasis added.]

[18] Regardless of whether the defendant consented to certification or not, the plaintiff was obliged to bring a motion and demonstrate to the court that the criteria in s. 5 of the *Class Proceedings Act* were satisfied. This was going to necessitate the filing of evidence with or without the defendant's consent.

[19] The contested motion lasted one day. I estimate that if it had been on consent it would have taken a few hours.

[20] Given that I declined to characterize the defendant's approach as an abuse of process, it necessarily follows that the defendant's conduct was not "reprehensible, scandalous or outrageous".

[21] There is not a case where the defendant's conduct justifies full indemnity or substantial indemnity costs being awarded. I agree that Rule 49.10 entitles the plaintiff to partial indemnity costs up to the date of the offer and substantial indemnity costs thereafter. The remaining issue is whether the costs requested are excessive.

The Costs are not Excessive

[22] Given the way the defendant approached this certification motion, it is not fair for the defendant to now say that the time spent on the certification motion was excessive. For months the defendant left the plaintiffs guessing as to why it would not consent to certification.

[23] On November 8, 2011, the court wrote to all counsel regarding the certification hearing. The court inquired "given the similarity with the *Dolmage, McKillop and Bechard* actions, do counsel require 4 days for the Seed action or can this motion be resolved?" Class counsel wrote to the defendant and inquired whether the defendant would consent to certification and if not, what parts of the certification test the defendant was contesting. The defendant did not respond.

[24] On November 23, 2011, class counsel wrote to the defendant and requested it to "advise as to what components of the section 5(1) certification test the Defendant intends to oppose at the return of the motion on April 10, 2012." Class counsel noted that the time for delivery of the plaintiff's factum was approaching and, without a response, the plaintiff would be forced to deliver written argument on every issue, increasing the costs of the motion. Class counsel indicated that without a response the plaintiff would seek costs for preparing the factum and preparing for the motion on a full scale. The defendant did not respond.

[25] On December 12, 2011, class counsel wrote again to the defendant noting there was no response and assuming the defendant was opposing on all issues. Class counsel stated again that the plaintiff would seek costs on a full scale.

[26] On December 22, 2011, class counsel wrote to the defendant and made an offer to settle certification by limiting the class definition to students and excluding the family class. This offer was not withdrawn. The defendant did not accept this offer.

[27] On January 11, 2012, the parties attended a conference call with the court. Counsel for the defendant confirmed to class counsel and the court that the defendant would advise of its firm position on certification by January 13, 2012.

[28] On January 13, 2012, class counsel asked for the defendant's position on certification. The defendant responded that they hoped to have instructions by the middle of the following week.

[29] On February 29, 2012, the day after the due date for the defendant's responding factum, class counsel asked the defendant if they would be filing a factum. The defendant responded that it would provide its position on certification imminently.

[30] On March 5, 2012, class counsel wrote again asking the defendant to provide its position and its factum. The defendant responded that it did not have instructions.

[31] On March 6, 2012, class counsel sought a case conference. Class counsel noted that the defendant had not filed any materials despite the passage of deadlines, nor had the defendant advised of its position. Class counsel stated that the motion was only a few weeks away and would require significant lawyer and judicial resources.

[32] On March 19, 2012, the defendant finally served its factum and submitted that the certification motion should be dismissed for the five reasons that articulated in the reasons for certification.

[33] The defendant compares the issues in this case to those incurred in *Slark*. Through this comparison, the defendant argues that the costs in this case are excessive. The defendant says that while the application of the facts and law differ from case to case, the work undertaken by counsel to prepare, including research, drafting and getting ready to argue the motion, would not be significantly different. I disagree. The evidence on each certification motion is unique. While this action like *Slark* is a systemic abuse case, this did not relieve class counsel of the obligation to collect the evidence relevant in this action, prepare the affidavits, relate the evidence to the certification criteria and prepare the factum.

[34] The same type of argument was made by the defendant in *MacDonald v. BMO Trust Co.* 2012 ONSC 2654. I rejected that argument at para. 25 as follows:

> The defendants seem to suggest that because this motion followed others that were similar, it should not have cost as much to argue certification. However, it also follows that if this was just another foreign currency exchange class action, then the defendants ought to have consented to what they suggest was an obvious outcome.

The defendant argues that the costs requested in this case are excessive because they exceed what was allowed in *Slark*. Mr. Justice Cullity awarded $112,000 in fees and $10,122.85 in

disbursements. The *Slark* certification hearing lasted three days while in this action it lasted one day. However, in this action unlike *Slark*, there was an offer to settle the certification motion and it was not accepted. The plaintiff offered to settle certification with a narrower class than what was ultimately certified. This offer dated December 22, 2011 was not withdrawn before the certification motion. As a result, costs on a substantial indemnity scale after the offer are justified in accordance with rules 49.10 of the *Rules of Civil Procedure*. Therefore the defendant's comparison with the costs in *Slark* is not a fair one.

[35] Fixing an amount for costs is not driven solely by a mathematical calculation. The court must be guided by the overriding principle of reasonableness as stated in *Boucher v. Public Accountants Council for the Province of Ontario*, [2004] O.J. No. 2634 (C.A.).

[36] Costs incurred by the defence can provide the court with a measure of what is reasonable. It is always open to the defence to provide this information, but they did not do so in this case. (See *Hague v. Liberty Mutual Insurance Co.* (2005), 13 C.P.C. (6th) 37 at para. 15 (Ont. S.C.J.).) A comparison of hours and fees is especially persuasive in determining the reasonable expectation of the unsuccessful party. In *Canadian National Railway Corp. v. Royal and Sunalliance Insurance Co. of Canada* (2005), 77 O.R. (3d) 612 (S.C.J.), the bill of costs was reduced by 25% after it was argued that the plaintiffs spent four times more than the unsuccessful defendants.

[37] In my view, partial indemnity costs up to the offer and substantial indemnity thereafter are justified and the amounts in question are not unreasonable. Fees on a partial indemnity scale up to the offer and substantial indemnity thereafter total $107,446.00 with disbursements of $4,128.26. In addition I allow applicable HST ($13,967.98).

[38] There is a wide range of cost awards for certification motions. The award in this case falls at the low end of the range and in the circumstances of this case it is a fair and reasonable costs award for a certification motion.

C. Horkins J.

Released: August 8, 2012

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ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

ROBERT SEED

Plaintiff (Moving Party)

– and –

HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF ONTARIO

Defendant(Responding Party)

REASONS FOR COSTS JUDGMENT

C. Horkins J.

Released: August 8, 2012